SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SHLOMO S. HAGLER** **PART** **17**

Justice

----------X

NANCY HUFFMAN, EDWARD HUFFMAN,

Plaintiff,

- v -

LIBERTY ELEVATOR CORPORATION, THE PEELLE COMPANY, JOHN DOE,

Defendant.

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INDEX NO. 152906/2018

MOTION DATE 12/08/2022, 12/20/2022

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

LIBERTY ELEVATOR CORPORATION

Plaintiff,

-against-

LFT HASTINGS LLC, HASTINGS RMR LLC

Defendant.

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Third-Party
Index No. 595916/2018

LIBERTY ELEVATOR CORPORATION

Plaintiff,

-against-

NEW HGO LLC

Defendant.

----------X

Second Third-Party
Index No. 595290/2019

The following e-filed documents, listed by NYSCEF document number (Motion 004) 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 164, 171, 172, 173, 174, 176, 177

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 163, 165

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

In Motion Sequence 004, defendant/third-party plaintiff Liberty Elevator Corporation ("Liberty") moves for summary judgment dismissing plaintiff Nancy Huffman's ("plaintiff") complaint as against it. In Motion Sequence 005, second third-party defendants New Baron 2085 LLC and New HGO LLC (collectively "New Baron") move for summary judgment dismissing Liberty's second third-party complaint for indemnification as against them.

FACTS

Plaintiff's Accident

This action for personal injury arises out of an incident that took place on April 2, 2015, in an A&P Supermarket located in Hastings-on-Hudson. The subject incident was an elevator accident that took place on the main floor of the store while plaintiff was employed at the store as a floral manager (Plaintiff's EBT, Liberty Ex. F [NYSCEF Doc. No. 118] at 16-18, 32).

Plaintiff testified that at the time of the accident, she was going to the basement level of the store to pick up a delivery of flowers at 11:00 a.m. (*id.* at 37-38). Deliveries such as this occurred two to three times per week (*id.* at 38). Plaintiff testified that she would "generally" take the freight elevator "all of the time" to retrieve the deliveries (*id.* at 41). However, she testified that on the day of the accident she took the stairs down to the basement because "[w]hen deliveries were being brought downstairs, you couldn't use the elevator" (*id.* at 44). Plaintiff would push a cart ("U-boat") with the pallets of flowers to the freight elevator and take the elevator up one floor from the basement to the main floor, where the flower department was located (*id.* at 42-43). No one used the freight elevator besides employees of the store (*id.* at 41). She pulled the U-boat towards the elevator (*id.* at 49). The doors of the subject elevator open vertically, where "one goes up and one goes into the floor" (*id.* at 50). The vertical doors must be opened manually, and plaintiff testified that there is a "little ledge" on the outside of the door that

she must push down, and then plaintiff uses her foot to push the lower door firmly into the floor (*id.* at 53). After plaintiff opens the vertical doors, there is a cage that she must open in order to enter the elevator (*id.* at 50). Plaintiff testified that she usually worked five days a week, and normally would use this elevator "[p]robably a good four or five times a day" (*id.* at 55-56).

Plaintiff testified that her accident occurred when she was exiting the elevator going into the store on the ground level (*id.* at 51). When entering the elevator in the basement, she pulled the U-boat into the elevator and opened and closed the gate and door without incident (*id.* at 62-64). When the elevator arrived at her destination on the main floor, plaintiff testified that the "first thing I do is I have to lift the gate, I have to pull the gate up and push it up and then I have to separate the doors" (*id.* at 65). Plaintiff testified that the accident involved the vertical bi-parting elevator doors. She testified as follows:

> What I did was put my hands on the door and had to push down on the door and put my foot on it, pushed it down into the floor and the door bounced back up and took me up in the air. It bounced out of the floor.

Id. at 66.

Plaintiff further testified that the bottom door went down to about thigh height, then "bounced back up and it came up out of the floor a little unevenly and threw me" (*id.* at 68). She was "worried about the top of [her] head hitting the gate" but testified that her head did not hit anything (*id.* at 69). After the elevator door bounced back up, plaintiff did not fall to the ground but rather landed back on both feet (*id.* at 70). Plaintiff testified that the elevator has similarly "bounced" one other time, "probably around six years before" (*id.* at 73).

The Subject Contract

In March 2011, Liberty Elevator Corporation and The Great Atlantic & Pacific Tea Company ("A&P Stores" or "A&P") entered into a contract entitled "Elevator Preventative

Maintenance" whereby Liberty Elevator would provide repair and maintenance services to the elevator located in the Hastings A&P Supermarket (*see* Contract [NYSCEF Doc. No. 125]). The intent of the contract was to "provide a preventative service program complete in every respect[,]" and provides that "the Contractor [Liberty] will furnish all material, equipment and labor to complete this contract" (*id.* § 1.02A). The contract stipulates that Liberty "shall take all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, injury, or loss to . . . All employees assigned to work on A & P Stores elevators and all other persons who may be affected thereby" (*id.* § 1.13B).

Liberty's scope of work is addressed in the contract and includes a list of equipment Liberty is responsible to repair and maintain; however, this "list is not meant to be all-inclusive but to act as an outline for the type of work covered under this agreement" (*id.* § 2.02A). Included in this list at item number 7 is "Hoistway door interlocks or locks and contacts; hoistway door hangers and tracks, bottom door gibs and auxiliary door closing devices for power operated doors" (*id.*). The contract specifies that maintenance should be provided at a "constant, high quality level to properly protect all elevator equipment . . ." (*id.* § 2.03).

The contract indicates that A&P Stores "reserves the right to make inspections and tests as and when deemed advisable" (*id.* § 2.05B). If A&P finds a mechanical or electrical deficiency with the elevator, it is A&P's responsibility to notify Liberty in writing. Liberty then has 30 days to cure this deficiency, after which "A & P Stores may terminate the Contract and employ a new Contractor to make the correction at the original Contractor's expense" (*id.*).

The parties do not dispute that this contract was in effect at the time of plaintiff's accident.

The Subject Elevator

Louis Chianca ("Chianca") appeared for an examination before trial on behalf of defendant Liberty. Chianca was employed by Liberty as a quality control and repair sales manager and had been employed there for six years at the time of the deposition (Chianca's EBT, Liberty's Ex. G [NYSCEF Doc. No. 119] at 16-17). Chianca testified that when Liberty has a maintenance contract with a customer, it is exclusive "whereby Liberty would be the exclusive contractor maintaining the elevators" at that location (*id.* at 27-28). Chianca also testified that Liberty Elevator would provide "a monthly service to make sure that the unit is running properly, doors and gates are operating properly, and that the unit is levelling properly, going up and down to each floor" as a reasonable precaution to prevent injury from elevator malfunctions (*id.* at 32-33). Chianca testified that if there were specific issues with the elevator, A&P would notify Liberty via email at a general maintenance email address, whereupon a ticket would be created for the job and a technician would be dispatched to respond (*id.* at 64-65). A work ticket may also be created without notification by a client when Liberty performs general maintenance on the elevator (*see id.* at 72).

Chianca confirmed that a work ticket from September 4, 2014 involved the bi-parting doors at issue in plaintiff's accident (*id.* at 79-80). He explained there was an issue with "the mechanism that locks the elevator door when the elevator is not at that floor" (*id.* at 80). Another work ticket created September 19, 2014 involved the bi-parting door, as there was an issue with the middle floor door lock as well as "the mechanism that engages a stationary cam on the elevator that releases the lock assembly when level at a particular floor" (*id.* at 86). Chianca testified that while this work ticket involved the door itself, it is unrelated to the "pushing down of the lower part of the biparting door" which was the subject of plaintiff's accident (*id.* at 87).

The next service ticket created in relation to the hoistway doors was on October 9, 2014, where a "guide shoe" was removed and adjusted (*id.* at 91). A guide shoe is "the member that rides on the guide track, allowing the door to open and close" (*id.*).

On January 30, 2014 a report was created that, if accepted, would allow Liberty to "furnish and install three sets of Peelle landing doors, one for each floor" (*id.* at 103, 110). Peelle landing doors are "biparting door[s] for the shaftway or hoistway" (*id.* at 108). Liberty recommended the replacement of the doors needed "immediate attention" (*id.* at 109). The report was signed on May 14, 2014 (*id.* at 109).

In late March and early April 2015, an e-mail exchange between Peter Stackhouse of Liberty and Krzysztof Wysoczanski of A&P Stores made clear that the biparting hoistway doors should be replaced because "the space between the doors and landing sill is greater than allowed by code and the doors are bowed and caused issues within the controller unit" (*id.* at 124). To Chianca's knowledge, this replacement was never made (*id.*).

The Lease

In 2004, second third-party defendants New Baron 2085 LLC and New HGO LLC (collectively "New Baron") purchased the property located at 87 Main Street, Hastings on Hudson, New York, where plaintiff's accident occurred in 2015. The property was leased to A&P Stores at the time New Baron purchased the property (*see* Rettner's EBT, Liberty Ex. M [NYSCEF Doc. No. 129] at 12). As such, New Baron assumed the 2004 Lease with A&P Stores upon its purchase of the property (*see* Lease, New Baron's Ex. D [NYSCEF Doc. No. 156]; New Baron SMF [NYSCEF Doc. No. 133] ¶¶ 20-21).

Ronald Rettner ("Rettner") was deposed on behalf of second third-party defendants New Baron. At the time of plaintiff's accident, Rettner was a member of New Baron 2085 LLC and

New HGO LLC, the two entities that, as tenants in common, owned the building A&P leased (*see* Rettner's EBT at 10). He testified that his day-to-day duties as a member of these two LLCs was to "file tax returns and make sure that [A&P] had insurance in place" (*id.* at 12).

Rettner testified that the New Baron LLCs "had no day-to-day obligations whatsoever. In fact, we had . . . no right to go into any area but the public areas of the property" (*id.* at 14). Under the terms of the lease, the lessee was responsible for the building structure (*id.* at 17). Further, A&P as lessee is responsible for addressing issues "with the freight elevator" (*id.*). Indeed, Article 9 of the lease, entitled "Maintenance," states:

> Lessee, at its own expense, shall (i) maintain the Property in a good state of condition and repair and in a commercially reasonable manner consistent with the operation and maintenance standards of similar properties taking into consideration the then current use of the Property and the business, if any, conducted therein, (ii) maintain the Property in accordance with the requirements of all insurance policies relating to the Property required to be maintained hereunder and in compliance with the Applicable Laws and (iii) make repairs and Alterations of the Property necessary to keep the same in the condition required by the preceding clauses (i) and (ii), whether interior or exterior, structural or nonstructural, ordinary or extraordinary, foreseen or unforeseen and regardless of whether such expenditures would constitute expenses under GAAP if made by the owner of the Property.

Lease at 31.

Rettner had no knowledge of the contract between Liberty and A&P (Rettner's EBT at 18-19). He stated that New Baron was "not a party of the contract" (*id.*) Moreover, New Baron "never received any complaint regarding the condition of the elevator. Never. None" (*id.* at 21).

PROCEDURAL HISTORY

Liberty moved for summary judgment under Motion Sequence 004 to dismiss plaintiff's complaint against it. New Baron moved for summary judgment under Motion Sequence 005 to dismiss Liberty's third-party complaint for contractual and common law indemnification as

against them. At oral argument held on May 2, 2023, the court dismissed Liberty's contractual indemnification claims against New Baron (*see* NYSCEF Doc. No. 165). Continued oral argument was held on July 24, 2023.

SUMMARY JUDGMENT STANDARD

"[T]he proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, "the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). Finally, evidence must be "construed in the light most favorable to the one moved against" (*Kershaw*, 114 AD3d at 82). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION

Liberty's Motion

"In order to prevail on a negligence claim, 'a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting

therefrom'" (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016] [internal quotation marks and citation omitted]). A contractor does not ordinarily owe a duty to a third party except in three circumstances. Such circumstances where a contractor may be liable to a third party in tort are:

> "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm'; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely"

(*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002] [citations omitted]).

Liberty argues in support of its motion for summary judgment that it did not owe plaintiff a duty because none of these exceptions apply (Liberty Aff. in Support [NYSCEF Doc. No. 111] at 6). Plaintiff argues that Liberty owed plaintiff a duty under the terms of the contract (Plaintiff's Opp. [NYSCEF Doc. No. 149] at 4).

At the outset, it must be reiterated that plaintiff is a third-party whose safety is intended to be covered under the contract. Section 1.13 requires Liberty to "take all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, injury or loss to: 1. All employees assigned to work on A & P Stores elevators . . ." (Contract § 1.13A). Plaintiff, as an employee of A&P who uses the elevator, was part of a "known and identifiable group" intended to benefit and be protected by Liberty's elevator repair and maintenance services and is owed a duty if one of the three *Espinal* exceptions apply (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 589 [1994]).

The most applicable *Espinal* exception and the one at issue in this case is the third exception: "where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Espinal*, 98 NY2d at 140). A contracting party is considered to have

"entirely displaced" the other party's duty when the subject contract is "'comprehensive and exclusive' as to preventative maintenance, thus making the defendant 'the sole privatized provider . . .'" for the safety of the elevator (*Church v Callanan Indus.*, 99 NY2d 104, 113 [2002], *citing Palka*, 83 NY2d at 588-89). The First Department has found a maintenance contract to be comprehensive and exclusive even when the owner retains some level of "possession or control" over the elevator by virtue of being the building owner or manager (*Hodges v Royal Realty Corp.*, 42 AD3d 350, 351 [1st Dept 2007]). In *Hodges,* the First Department found the following:

> By contract, all responsibility for the daily operation of the building's elevators was ceded to Schindler [the elevator company]. Royal [the building manager] had no role in inspecting, maintaining or repairing the elevators; those duties and their faithful execution were the total and complete responsibility of Schindler by virtue of its contract with Durst [the building owner]. Schindler not only provided a mechanic on site to handle all service calls and performed all routine and preventative maintenance as well as periodic inspections, it also informed Royal when any additional work on the elevators was needed. Schindler's control was so absolute that the contract expressly provided that Durst could not allow any other entity other than Schindler to make alterations, additions, adjustments, repairs or replacements to the elevators.

Id. at 352 [internal quotation marks and citations omitted].

Liberty argues the contract was not comprehensive and exclusive because, per the terms of the contract, A&P reserves certain rights to inspect and make determinations about the repairs or maintenance Liberty is required to perform (Liberty Supp. Brief [NYSCEF Doc. No. 167] at 3). In opposition, plaintiff argues that the contract is an exclusive and comprehensive preventative maintenance contract, which imposed upon Liberty a duty to take "all reasonable precautions for the safety of the plaintiff . . ." (Plaintiff's Opp. at 4).

Here, three provisions in particular demonstrate that the contract between Liberty and A&P Stores is "comprehensive and exclusive." First, Section 1.02 states, "The intent of these

specifications is to provide a preventative maintenance service program *complete in every respect*, for a term of one year effective April 1, 2011" (Contract § 1.02 [emphasis added]). The contract language here is unambiguous in that, based on the use of the phrase "complete in every respect," the preventative maintenance program laid out in the contract is intended to be comprehensive.[1] The word "complete" shows up once again in Section 2.01, titled "Scope of Work": "The work to be performed by the Elevator Contractor under the specification shall consist of furnishing all material, labor, supervision, tools, supplies and other expenses necessary to provide *full and complete preventative maintenance services* . . ." (Contract § 2.01 [emphasis added]). Based on the repeated use of the word "complete," it is evident that the parties intended the contract to be a *comprehensive* preventative maintenance contract with respect to the subject elevator.

Liberty argues in its reply that the subject contract is not comprehensive and exclusive because, unlike the contract in *Palka* which was found to be comprehensive and exclusive, the contract here did not require "daily maintenance duties" (*Palka*, 83 NY2d at 588; Reply [NYSCEF Doc. No. 160] at 6). However, Liberty did not provide any case law demonstrating that a contract should be found *not* comprehensive and exclusive--despite explicit language to the contrary--because the maintenance schedule was on a less-than-daily basis. Absent case law requiring a daily or weekly maintenance schedule in order to consider a preventative maintenance contract 'comprehensive and exclusive,' the clear words of the contract here should control (*see W.W.W. Associates v Giancontieri*, 77 NY2d 157, 162 [1990] ["when parties set

[1] Indeed, a search of the definition of the word "comprehensive" reveals its synonymity with the word "complete" (*see* "Comprehensive" definition, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/comprehensive [defining "comprehensive" as "covering completely or broadly"]).

down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms"]).

As well as being comprehensive, the preventative maintenance contract between Liberty and A&P is exclusive. Section 2.05 states that upon inspection, if A&P finds a deficiency in the elevator or elevator equipment, A&P must notify Liberty who then has 30 days after such notice to cure the deficiency. "In the event that the deficiencies have not been corrected within 30 days, A & P Stores may terminate the Contract and employ a new Contractor to make the correction at the original Contractor's expense" (Contract § 2.05C). The contract is exclusive in that in order to hire another contractor to perform work on the elevator, A&P must first terminate the contract with Liberty. A&P may terminate the contract after providing notice of a deficiency *only when* Liberty does not correct it within 30 days. As plaintiff states, the contract, while in effect, "prevents A&P from getting another contractor to do the work" (Plaintiff's Supp. Brief 1 [NYSCEF Doc. No. 171] at 4).

In support of its motion, Liberty argues that Section 2.02J of the contract demonstrates that the contract is *not* comprehensive and exclusive and therefore Liberty did not entirely displace A&P's duties with respect to the elevator. Section 2.02J states:

> The Contractor shall be responsible for notifying A & P Stores (in writing) of the existence or development of any defects in, or repairs required to, the elevator equipment, which he does not consider to be his responsibility under the terms of the contract. The Contractor shall furnish A & P Stores with a written estimate of the cost to correct any such defects or make the required repair. A & P Stores reserves the right to make the final determination concerning the responsibility for such defects, corrections or repairs. Refer to paragraph 1.14 [change orders].

Contract § 2.02J.

Liberty argues that this language demonstrates that A&P kept a level of control over the elevators pursuant to this contract and therefore the contract is not comprehensive and exclusive

(*see* Liberty Supp. Brief at 3). The First Department's decision in *Hodges* as quoted above is instructive. Based on the relationship between the parties, the First Department found that the contract was comprehensive and exclusive despite the building defendants retaining a level of control and being "informed . . . when any additional work was needed" (*Hodges*, 42 AD3d at 352). There, as here, the elevator company was charged under the contract with letting the building manager know of any "additional" maintenance or repair work needed for the elevators. This did not take away from the comprehensive and exclusive nature of the contract in *Hodges*, and similarly does not mean the contract between Liberty and A&P is not sufficiently comprehensive and exclusive.

Moreover, 2.02J refers to change orders to expand the scope of the contract as it directs the reader to reference section 1.14 of the contract, which is entitled "Changes." This section of the contract does not provide A&P with the right to perform repair work or maintenance of the elevator; it simply is "akin to a reservation of rights to audit the cost and appropriateness of the proposed work" (Plaintiff Supp. Brief 2 [NYSCEF Doc. No. 174] at 1). Such reservations of rights to be informed do not amount to a level of control sufficient to make the whole of the contract not comprehensive and exclusive (*see Hodges*, 42 AD3d at 352; *see also Coswert v Macy's E., Inc.*, 79 AD3d 1319, 1320 ["The fact that Macy's reserved the right to audit the work performed by ThyssenKrupp to ensure that it was in accordance with the terms and conditions of that agreement does not prove that ThyssenKrupp did not assume exclusive responsibility for the maintenance of the escalator"]). The contract's terms are clear regarding the comprehensiveness and exclusivity of Liberty's responsibility to provide maintenance and repair services to the elevator and there is nothing elsewhere in the contract to suggest that Liberty did not entirely

displace A&P's duty to maintain the safety of the elevator. As such, the third *Espinal* exception applies, and Liberty owed a duty to the intended third-party beneficiary plaintiff.

After determining that Liberty did indeed have a duty to the plaintiff through its contract with A&P, summary judgment can only be granted if Liberty met its *prima facie* burden of showing that it did not breach this duty. Liberty does not provide any material facts or arguments supporting that Liberty did not breach its duty, nor did it provide an expert affidavit opining that the elevator was properly inspected and maintained by Liberty to prevent the malfunction that caused plaintiff's injury. Liberty only offers the argument that it put A&P on notice that there may be an issue with the elevator door by "recommend[ing] to A&P replacement of the freight elevator doors prior to the accident" (Liberty Reply at 7; Liberty Ex. L [NYSCEF Doc. No. 168]).[2] This is not enough to meet Liberty's burden of showing that there was no genuine issue of fact and that Liberty did not breach its duty to the plaintiff.

Conversely, plaintiff offered an affidavit of an expert to create an issue of material fact on the issue of breach that precludes granting summary judgment. Patrick A. Carrajat ("Carrajat") reviewed the parties' deposition testimony, motion papers, service and repair records of the subject elevator, the contract, and other documents "referring to the elevator doors at the subject premises" (Carrajat Aff. [NYSCEF Doc. No. 150] at 2). Carrajat avers that the accident occurred "when the lower door panel failed to remain in the closed position and began to rise. This is caused when the mechanism that keeps the bottom panel into place is not operable" (*id.* at 4). Carrajat further explains that the upper door panel, when working correctly, would keep the

[2] Liberty argues that the email exchange "establishes that Liberty put its client A&P on notice of the condition and they failed to approve same" (Plaintiff's Supp. Brief at 5). This at most establishes the existence of an issue of fact with respect to allowing Liberty access to complete the door replacement. It does not establish that Liberty lacks comprehensive and exclusive control, as it argues, nor does it establish that Liberty is entitled to summary judgment because it does not show that Liberty did not breach its duty.

lower panel from moving (*id.*). Carrajat opines that the defendants were in exclusive control of the elevator based on the contract and that evidence of service calls regarding the door in the six months prior to the accident "brings into question the efficacy of these repairs, and put the defendant on notice of a potential door malfunctioning" (*id.* at 4-5). Carrajat avers that in his opinion, "unplanned and unexpected upward movement of the lower door panel does not occur on an elevator absent negligence in its inspection, maintenance, repair and adjustment" (*id.* at 6).

In reply, Liberty only disputes a few of Carrajat's statements. It states that it did in fact "alert[] the maintenance contractor to inspect and maintain the panel keeper to ensure it would not malfunction as it did" as Carrajat said, and again points to the email exchange regarding the work order to replace the doors (Reply at 8). It is clear that Liberty did not consider itself to be the "maintenance contractor" mentioned in Carrajat's affidavit and uses the email exhibit to put that burden onto A&P. This is without merit as it has already been determined that Liberty was the sole maintenance provider for the elevator at issue and was in fact the "maintenance contractor" whose job Carrajat opines it was to inspect and repair the elevator.

Liberty also argues in response to this expert affidavit that "this is a structural aspect of the building and the responsibility of [New Baron]" as the owner (Liberty Supp. Brief at 5-6). As will be discussed further below, the elevator was not, and never has been, in New Baron's control—it was ceded by lease agreement to A&P, which in turn ceded responsibility for the maintenance and servicing of the elevator to Liberty under the comprehensive and exclusive contract discussed in detail above. The repair of the doors was a job squarely within Liberty's purview under its contract with A&P.

Given that Liberty did not meet its burden to show that it did not breach its duty to plaintiff under the third *Espinal* exception, its motion for summary judgment must be denied.

New Baron's Motion

Second third-party defendants New Baron move for summary judgment dismissing Liberty's third-party complaint for indemnification against it on the ground that the New Baron defendants were not negligent as they "were out-of-possession landlords and had no responsibility for maintenance or repairs at the subject premises" (New Baron Aff. in Support [NYSCEF Doc. No. 132] at 6). As mentioned above, the only issue remaining on this motion sequence is the issue of common-law indemnification.

"[T]he predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, [therefore,] it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (*Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1st Dept 1985]; *see also Edge Mgt. Consulting, Inc. v. Blank*, 25 AD3d 364, 367 [1st Dept 2006]). Common law indemnification requires a lack of negligence on the part of the indemnitee, but the proposed indemnitor must also be shown to be "guilty of some negligence that contributed to the causation of the accident" for which the indemnitee is being held liable (*Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 65 [1st Dept 1999]). A party moving for summary judgment to dismiss a claim for common law indemnification can meet its *prima facie* burden "by establishing that the plaintiff's accident was not due to its own negligence" (*Calle v 16th Avenue Grocery, Inc.*, 219 AD3d 450, 452 [2d Dept 2023]). This can be done by a showing that the owner did not "supervise, direct or control the work of the contractor" (*Martins v Little 40 Worth Associates, Inc.*, 72 AD3d 483, 484 [1st Dept 2010]).

The New Baron defendants argue that the claim for common law indemnification should be dismissed because they were nonnegligent out-of-possession landlords. They argue that "an

out of possession landlord may not be held liable for a third party's injuries on the premises unless the landlord had notice of the defect and consented to be responsible for maintenance and repair" (New Baron Aff. in Support at 5; *see, e.g., Manning v New York Telephone Co.*, 157 AD2d 264, 268 [1st Dept 1990]). New Baron argue that they did not have the responsibility to perform (nor ever did perform) inspections, repairs, or maintenance on the subject elevator (New Baron Aff. in Support at 5). Article 9 of the lease between New Baron and A&P Stores relinquishes virtually all rights and responsibilities with respect to maintenance of the property, including structural repairs, to the tenant A&P (*see* Lease, Art. 9 ["Lessee, at its own expense, shall . . .make repairs and Alterations of the property . . . whether interior or exterior, structural or nonstructural, ordinary or extraordinary, foreseen or unforeseen . . ."]). New Baron did not have rights under the lease to enter nonpublic areas of the property, where the elevator was located, and never received notice about any issue with the freight elevator (*see* Rettman's EBT at 14,17; New Baron Reply [NYSCEF Doc. No. 163] at 3-4). There was no circumstance under which New Baron could supervise or control Liberty's work because they had relinquished that responsibility entirely to A&P via the lease agreement.

In response, Liberty argues that it owes no duty to plaintiff, but conversely, second third-party defendants "as owner of [the] property owes a duty to its tenants and their employees . . . to provide a safe premises" (Liberty Aff. in Opp. [NYSCEF Doc. No. 157] at 2). Liberty fails to raise a genuine issue of material fact as this declaration contains no support (*see* Liberty Aff. in Opp. at 3). Again, the only evidence given by Liberty in support of this contention is the email exchange between itself and A&P, which does not even include New Baron as a party and therefore could not possibly have put New Baron on notice of the dangerous condition. It showed no evidence creating an issue of fact as to whether New Baron had access to the property, had

notice of the elevator's malfunction, or had the opportunity or responsibility to oversee Liberty's work on the elevator.

Since New Baron has met their *prima facie* burden of showing that they were not negligent with respect to the subject elevator accident, and since Liberty could not create an issue of fact as to same, Liberty's third-party claim for common-law indemnification is dismissed as against New Baron.

CONCLUSION

Accordingly, it is

ORDERED that Liberty Elevator Corporation's motion for summary judgment (Mot. Seq. No. 004) dismissing plaintiff's complaint as against it is denied; and it is further

ORDERED that New Baron 2085 LLC and New HGO LLC's motion for summary judgment (Mot. Seq. No. 005) dismissing Liberty's second third-party complaint as against them is granted.

The clerk shall enter judgment accordingly.

March 4, 2024
DATE

SHLOMO S. HAGLER, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE